paid. Question of damages to be decided at the trial proper of the suit.

Indeed, by a strange twist of irony, the story highlighted by the defendants in their newspaper, whether true or not, has brought publicity to the plaintiff's constituency that the plaintiff has been operating a service centre to serve the needs and to look into the problems of the people of his constituency who elected him, something which is commendable of an elected representative. In fact the plaintiff should be thankful that there is a press like the defendants' to check and improve the plaintiff's services to the people of his constituency.

The defendants' newspaper *Thinamani*, like all the newspapers, is a free press although there are certain laws restricting their publication.

Reports on the workings, activities, conduct and services of the elected representatives of legislatures are not restricted by any law except that the reports must not be untrue.

The people who elected their representatives have a right to know what their elected representatives are doing and to improve the conditions in their constituencies and to meet the needs of the electorate. And if in the process some unpleasant criticisms are made, made bona fide and in the interest of the constituency and the people of the constituency whose welfare and needs the elected representative is duty bound to look after, then the representative cannot complain. In fact the higher one goes, especially in the political echelon, one is more open to criticism and public attention is focused him, even to the extent of losing one's privacy. This is the price one has to pay for high elected office like that of the plaintiff.

The plaintiff is not without remedy. If at the trial he can prove that the statement published by the defendants was not true, he is entitled to damages. And if the defendants were to publish anything false against the plaintiff, the plaintiff can still come to the court for relief.

Application allowed.

Solicitors: *Muthu & Partners* ; *N Ramachandran & Co* .

Reported by *Ng Sheau Jiuan*

Lim Sin Oo & Ors v Cheah Tjeng Siong

HIGH COURT (PENANG) – CIVIL SUIT NO 23-234-87
WAN ADNAN J
26 JANUARY 1989

Contract – Specific performance – Claim for – Failure on defendant's part to pay balance of purchase price for property – Whether plaintiffs entitled to claim specific performance under terms of sale agreement – Plaintiffs terminated existing tenancies in contemplation of sale agreement – Whether damages an adequate remedy – Specific Relief Act 1950, s 11(1) & 19

Contract – Rescission – Failure on defendant's part to pay balance of purchase price for property – Notice of demand of payment sent to defendant – Negotiations between plaintiffs and defendant on lower purchase price – Failure in negotiations – Whether conduct signified abandonment of sale agreement

By an agreement made between the plaintiffs and the defendant, the plaintiffs agreed to sell to the defendant a piece of property for $999,000. The defendant made a total payment of $399,900 but had failed to pay the balance of $599,100. The plaintiffs sent a notice to the defendant demanding payment of $599,100 and subsequently there were negotiations wherein the defendant evinced an intention to complete the sale at a lower price. However, negotiations broke down and the plaintiffs claimed for specific performance of the agreement. The defendant then applied for an order that the statement of claim be struck off, contending that: (a) the agreement had been rescinded and the plaintiffs are therefore only entitled to the remedy under cl 7 of the agreement which was that they were entitled to forfeit the deposit and resell the property to other persons; (b) by virtue of cl 13 of the agreement (which stated that 'the purchaser shall be entitled to specific performance of this agreement and also to file private caveats against the property upon the execution of the agreement'), only the defendant was entitled to the relief of specific performance; (c) the plaintiffs had breached the agreement by unilaterally extending the completion date. The plaintiffs argued that this was a proper case for the court to exercise its discretion to grant specific performance of the agreement because the pecuniary compensation for its non-performance would not afford adequate relief. They said that they took steps to terminate three existing tenancies by compensating the tenants and had thereby suffered loss and damage when the defendant failed to complete the agreement.

Held, dismissing the defendant's application:

(1) An agreement is rescinded only when there is a total abandonment of the whole contract. The parties had continued to negotiate after the issue of the notice, and upon the failure of the negotiations, the plaintiffs issued another notice. The conduct clearly negatived any intention to abandon the contract. There was therefore no rescission of the agreement.

(2) Clause 13 does not state that the plaintiffs (vendor) are disentitled to the relief of specific performance. Section 19 of the Specific Relief Act 1950 provides that a contract may be specifically enforced even though a sum is named in the contract as the amount to be paid in case of its breach. Therefore the stipulation in cl 7 of a sum of money to be paid as damages in case of breach by the purchaser (defendant) is not a bar to a claim for specific performance by the plaintiffs. The clause also says 'at their absolute discretion ...'. This shows that under the provisions of cl 7 the plaintiffs (vendor) had the choice of either determining the agreement or claiming for specific perform-

ance. The plaintiffs were entitled to claim for specific performance of the agreement.

(3) There is no evidence that the defendant had at any time objected to the extension of the completion date. It was very probable that the defendant had consented to the extension.

(4) The agreements terminating the tenancies were all executed by the plaintiffs in contemplation of the execution of the agreement. The plaintiffs had suffered loss and damage. In the circumstances of the case, damages would not be an adequate remedy to the plaintiffs and the agreement between the plaintiffs and the defendant is ordered to be specifically enforced and carried into execution.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 507 of 1988.]

Legislation referred to
Specific Relief Act 1950 ss 11(1), 19

(Ms) Karen Lim Ai Ching for the plaintiffs.
Ng Choo Hock for the defendant.

Cur Adv Vult

Wan Adnan J: In this action the plaintiffs claimed for specific performance of the written agreement made between the plaintiffs and the defendant on 15 November 1984 for the payment of the balance of the purchase price of the land known as Holding No 329, TS 15, North-East District together with the premises thereon ('the said property') amounting to $599,100 and other reliefs. The defendant had counterclaimed against the plaintiffs for the sum of $417,900.

By the summons-in-chambers dated 26 November 1987 (encl 8) the plaintiffs had applied for the order of specific performance pursuant to O 81 of the Rules of the High Court 1980 and for the defendant's defence and counterclaim to be struck out. By the summons-in-chambers dated 19 February 1988 (encl 10) the defendant had applied for the order that the statement of claim, reply and defence to counterclaim be struck out (this was abandoned during the hearing) and that judgment in terms of the defendant's counterclaim to be entered against the plaintiffs.

The two applications were heard together. After hearing the parties in open court I allowed the application of the plaintiffs and granted the order of specific performance in terms of the minutes of the judgment filed and I dismissed the counterclaim. The defendant's application was therefore dismissed.

Against this order the defendant now appeals.

According to the plaintiffs by the agreement dated 15 November 1984 made between them and the defendant ('the agreement') they had agreed to sell to the defendant the said property for the purchase price of $999,000. Pursuant to cl 2 of the agreement, the defendant paid to the plaintiffs a deposit of $99,900. The balance of the purchase price was to be paid in accordance with cl 4 of the agreement in the following manner:

(a) the sum of $199,800 being 20% of the purchase price must be paid within six months from the date of the agreement (that is, by 15 May 1985);

(b) the final sum of $699,300 being 70% of the purchase price must be paid within nine months from the date of the agreement (that is, by 15 August 1985).

By 20 November 1985 the defendant had paid a further sum of $300,000 making the total payment of $399,900. The defendant had failed to pay the balance of $599,100. The defendant stated in his defence that he had paid the total of $417,900. But at the hearing his counsel had agreed to accept the plaintiffs' figure for the purpose of the application.

Clause 7 of the agreement states as follows:

> If the purchaser fails to pay the balance purchase price under cl 4 above within the time stipulated the vendors may at any time thereafter at their absolute discretion forthwith determine the agreement and rescind the contract which shall become effective from the date of the vendors giving notice in writing in this behalf to the purchaser and to resell the said property to other persons on the happening of which event the vendors shall be entitled to forfeit the deposit of $99,900 paid under cl 4 hereof as liquidated damages for breach of contract and not by way of penalty.

Clause 13 states as follows:

> The purchaser shall be entitled to specific performance of this agreement and also to file private caveats against the said property upon the execution of the agreement.

Whether the agreement has been rescinded

On 22 August 1986 the plaintiffs sent a notice (exh L8 in encl 7) to the defendant demanding payment of $599,100 within one month. The notice also stated 'failing which my clients will take steps to rescind the agreement and forfeit the deposits'. On 27 February 1987 another notice (exh L9 in encl 7) was sent to the defendant demanding the said sum of $599,100 within six weeks. The notice also included the words 'failing which our clients' instructions are to rescind the agreement and to forfeit the deposit and ...'.

The plaintiffs said that after the issue of the notice dated 27 February 1987 there were negotiations wherein the defendant evinced an intention to complete the sale at a lower price. However, negotiations broke down. Then on 19 May 1987 the plaintiffs' solicitors wrote another notice (exh L7 in encl 14) demanding the sum of $599,100 'within two weeks otherwise we have strict instructions to proceed with legal action'.

The defendant contends that the agreement had been rescinded and therefore the plaintiffs are only entitled to the remedy under cl 7 of the agreement.

An agreement is rescinded only when there is a total abandonment of the whole contract. The parties had continued to negotiate after the issue of the notice and upon the failure of the negotiations the plaintiffs issued another notice. The conduct clearly negatived any intention to abandon the contract. I therefore held that there was no rescission of the agreement.

Whether the plaintiffs can claim for specific performance in view of the provision of cll 7 and 13 of the agreement

The defendant contends that cl 7 of the agreement provides the only remedy available to the plaintiffs in event of breach. It is further contended that by virtue of cl 13 of the agreement only the purchaser (defendant) was entitled to the relief of specific performance.

Clause 13 must not be construed to include something it does not provide. It does not state that the vendor (plaintiffs) are disentitled to the relief of specific performance.

Section 19 of the Specific Relief Act 1950 states:

> A contract, otherwise proper to be specifically enforced, may be enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Clearly therefore the stipulation in cl 7 of a sum of money to be paid as damages in case of breach by the purchaser (defendant) is not a bar to a claim for specific performance by the plaintiffs. Further the clause says 'at their absolute discretion...'. This shows that under the provisions of cl 7 the plaintiffs (vendor) had the choice of either determining the agreement and forfeiting the deposit of $99,900 or claiming for specific performance.

I therefore held that the plaintiffs were entitled to claim for specific performance of the agreement.

Whether the plaintiffs had breached the agreement by unilaterally extending the completion date to 5 September 1985

The defendant contends that the plaintiffs by their solicitors' letters dated 31 July 1985 (exh CTS 2 in encl 13) and 6 September 1985 (exh CTS 3 in encl 13) had breached the agreement by unilaterally extending the completion date and thereby evinced an intention no longer to be bound by the agreement.

The plaintiffs contend that the extension was mutually agreed first to 5 September 1985 and then to 4 May 1986.

There is evidence that the plaintiffs and the defendant had direct contact with each other and made certain arrangements between themselves. The letter from the defendant's solicitors to the plaintiffs' former solicitors (exh L2, encl 7) is one of them. In the letter it was stated '...informing you that your clients have agreed to allow our client to pay the balance of $99,800 as soon as ...'. Another is the letter dated 20 November 1985 from the defendant's solicitors to the plaintiffs' solicitors (exh L7, encl 7). It was stated in the letter '...that your clients have agreed with our clients to extend the date of payment...'. The defendant himself had stated in his affida- (encl 13) that he had had discussions with the plaintiffs (see para 11 and 13 of the affidavit). There is no evidence that the defendant had at any time objected to the extension. On 6 September 1985 the plaintiffs' solicitors wrote to the defendant's solicitors (exh L4, encl 7). The new date of completion was stated. Again the date was mentioned in the letter dated 8 October 1985 (exh L6, encl 7).

I find that it was very very probable and I believe that the defendant had consented to the extension of the completion date to 5 September 1985.

Whether specific performance should be granted

The plaintiffs say that this is a proper case for the court to exercise its discretion to grant specific performance of the agreement because the pecuniary compensation for its non-performance does not afford adequate relief.

Section 11(1) of the Specific Relief Act 1950 states:

> Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced –
>
> ...
>
> (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief.

The plaintiffs say that in contemplation of the execution of the agreement they took steps to terminate three existing tenancies together with the termination of the management of the business at the premises by adequately compensating the tenants. There was the agreement dated 17 September 1984 (exh L10, encl 7) terminating a tenancy with effect from 31 May 1985. The tenant was paid $8,000 as compensation. There was the agreement with another tenant (exh L11, encl 7). The tenant was paid $10,000 as compensation for agreeing to quit on 31 May 1985. There was another agreement dated 17 September 1984 (exh L12, encl 7) with one Toh Hock Chuan who managed the business of Happy Hotel & Bar at the premises. He was paid $65,000 as compensation for agreeing to quit and vacate before 30 June 1985. The plaintiffs say that as a result of the termination of the business of Happy Hotel & Bar they have suffered loss and damage. No business could be carried on at the premises thereafter when the defendant failed to complete the agreement.

The defendant on his part had applied for and obtained from the Rent Tribunal Board the certificate of

de-control of the premises under s 23(2) of the Control of Rent Act 1966 (exh L6, encl 114). The certificate stated that the premises were vacated on 3 September 1985 and 'the premises No 116 Burmah Road, Penang shall forthwith cease to be controlled under s 23(2) of the Control of Rent Act 1966'. The certificate was dated 23 November 1985.

Under the agreement the defendant had agreed to purchase the land in question at the price of $999,000. But later as evidenced in the letter dated 19 May 1987 (exh L7, encl 14), the defendant had requested for the purchase price to be reduced to $600,000. He did not want to pay the price he had earlier agreed to.

I believe that the agreements terminating the tenancies and the management agreement dated 17 September 1984 were all executed by the plaintiffs in contemplation of the execution of the agreement. The plaintiffs had suffered loss and damage. The Happy Hotel & Bar business was closed. I also believe that the defendant had applied and obtained the certificate under the Rent Control Act 1966 and I accept as true the statement in the certificate that the premises had been vacated on 3 September 1985 and was vacant at the time the certificate was granted. The plaintiffs were able to deliver vacant possession on the new completion date, 4 May 1986.

I find that in the circumstances of the case damages would not be an adequate remedy to the plaintiffs. I find that the defendant had not raised any triable issue in the action. I therefore gave judgment with costs to the plaintiffs in terms of the minutes of the judgment filed, namely, that the agreement dated 10 November 1984 made between the plaintiffs of the one part and the defendant of the other part mentioned in the writ of summons be specifically enforced and carried into execution:

> And the defendant do pay the plaintiffs the balance of the purchase price amounting to $599,100 when the plaintiffs will then execute a conveyance of the property known as Holding No 329, TS 15, North-East District, Penang with premises No 116, Burmah Road, Penang thereon to the defendant.
>
> And the plaintiffs thereafter will give the defendant vacant possession of the said property.

Consequently I dismissed the defendant's application with costs.

Application dismissed.

Solicitors: *Presgrave & Matthews*; *Cheong Wai Meng & Van Buerle.*

Reported by *Ng Sheau Jiuan*

Shin Min Daily News (M) Sdn Bhd v Tan Chong Hin

HIGH COURT (PENANG) – CIVIL SUIT NO 16-4-1987
WAN ADNAN J
26 JANUARY 1989

Labour Law – Transfer of respondent from Penang to Kuala Lumpur – Non-acceptance of transfer by respondent – Respondent's service terminated – Complaint made to Pegawai Buruh – Pegawai Buruh ordered termination benefits to be paid to respondent – Whether Pegawai Buruh acted without jurisdiction in adjudicating on respondent's dismissal – What actual findings of Pegawai Buruh were – Employment Act 1965, ss 12(3) & 69

The respondent was employed by the appellant as a confidential clerk at the appellant's branch office in Penang. The appellant wanted to transfer the respondent to Kuala Lumpur but the respondent refused to accept the transfer, maintaining that under the letters of appointment and confirmation he was not liable to be transferred. The respondent's service was subsequently terminated by the appellant. Upon a complaint made, the Pegawai Buruh found in favour of the respondent and ordered the appellant to pay the respondent termination benefits and indemnity in lieu of notice. The appellant appealed to the High Court contending that the Pegawai Buruh had no jurisdiction under s 69 of the Employment Act 1965 ('the Act') to adjudicate on the respondent's dismissal on the grounds of misconduct.

Held, dismissing the appeal:

(1) A labour officer cannot hold an inquiry under s 69 and adjudicate whenever the question of the validity of the dismissal of an employee is in issue. He has no power to determine whether or not there has been any misconduct.

(2) However, the respondent's claim for indemnity in lieu of notice is under s 12(3)(e) of the Act. Under this section, the validity of dismissal is not in issue. The labour officer did not make any finding of misconduct. His finding was that the contract of service did not require the respondent to accept the transfer. Therefore the award of indemnity in lieu of notice is correct.

(3) In the respondent's claim for termination benefits under reg 4 of the Employment (Termination and Lay-Off Benefits) Regulations 1980, the validity of dismissal or misconduct is also not an issue. The labour officer had made no finding on misconduct.

Cases referred to

1 *Rajaretnam Palaniandy* v *Amalgamated Properties & Industries* [1988] 2 MLJ 363 (refd)
2 *Nylex (M) Sdn Bhd* v *Alias bin Chek* [1985] 1 CLJ 185 (refd)

Legislation referred to

Employment Act 1955 ss 12(3), 69
Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 4

P Jayasingam for the appellant.
*Shyama Narayanan Nair (Ms)*for thhe respondent.

[*Editorial Note*: The appellant has appealed to the Supreme Court vide Civil Appeal No 02-18-89.]

Cur Adv Vult